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IN THE

Supreme Court of the United States

No. 79-1000

ZEEV DICHNE,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

JOHN S. MARTIN, JR.
Attorney for Petitioner
460 Park Avenue
New York, New York 10022

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This brief is submitted in reply to the Brief in Opposition submitted by the United States.

The Government makes a critical concession and ignores a critical fact in its attempt to persuade this Court of the constitutionality of § 1101 of the Bank Secrecy Act (the "Act"). The Solicitor General concedes that the reports required by § 1101 subject some individuals to "a very real [possibility] that criminal offenses may be uncovered" (Brief in Opposition at 5), but contends that the provision is nonetheless constitutional because it also serves "significant nonprosecutorial interests of the government in monitoring the flow of currency across the nation's borders" (*Id.* at 7).

The latter part of the Government's argument cannot withstand analysis. The regulations under § 1101 require

reports only of those monetary instruments in bearer form or such form that title passes upon delivery, 31 C.F.R. § 103.11 (1979). Thus, the transportation out of the country of a $5,000 check made payable to a named payee and endorsed in blank must be reported, but the transportation of the same check, if unendorsed or specially endorsed, need not be reported. The Government's argument that this provision which monitors the transportation of endorsed checks, but not that of unendorsed checks, is designed to obtain information about the general flow of money out of the country simply defies all logic. There is, therefore, no basis for the Government's argument that the reports required by § 1101 have legitimate, nonprosecutorial uses.* Indeed, Congress has clearly stated that its purpose in enacting § 1101 was to "close a serious investigative loophole" which allowed "American criminal elements" to elude detection when transporting out of the country money from criminal activities. *See H.R. Rep. No.* 91-975, 92nd Cong., 2d Sess. 2, *reprinted in* [1970] *U.S. Code Cong. & Ad. News,* 4393, 4398.

The uniquely prosecutorial function served by § 1101 distinguishes this case from *California* v. *Byers,* 402 U.S. 424 (1971), where, in upholding an auto accident "stop and report" requirement, this Court stated:

> Whatever the collateral consequences of disclosing name and address, the statutory purpose is to implement the state police power to regulate use of motor vehicles.

Id. at 432. The identification of persons who are engaged in criminal activities is not a mere "collateral consequence" of § 1101; rather, such identification is the section's very *raison d'etre. See* 31 U.S.C. § 1051; *accord, United States* v. *San Juan,* 405 F. Supp. 686 (D. Vt. 1975), *rev'd on other grounds,* 545 F.2d 314 (2d Cir. 1976). Where, as here, the statutory purpose is to obtain incriminating information, those who would incriminate themselves by filing the required reports should not be stripped of the protection of the Fifth Amendment simply because Congress has cloaked its purposes in a statute which requires reports from a broader cross-section of society.

This Court's decisions in *Leary* v. *United States,* 395 U.S. 6 (1969); *Haynes* v. *United States,* 390 U.S. 85 (1968); *Grosso* v. *United States,* 390 U.S. 62 (1968); *Marchetti* v. *United States,* 390 U.S. 39 (1968); *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70 (1965), require that the statute be held to violate the petitioner's Fifth Amendment privilege against self-incrimination and the decision of the court below be reversed. Accordingly, we respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

JOHN S. MARTIN, JR.
Attorney for Petitioner

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* The Government's citation of a House Report which lists regulatory and nonprosecutorial purposes served by the various sections of Title II of the Act of which § 1101 is a part (Brief in Opposition at 7) is misleading: Title II of the Act has five subchapters which provide for a range of reports and procedures, including reports of transactions involving domestic and foreign institutions, reports of relationships with foreign financial agencies, as well as reports of the transport of monetary instruments. Unquestionably, Title II has nonprosecutorial regulatory functions but those functions are irrelevant to this case.